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LEGAL OPINION

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TO : Hon Adv. S.P. Holomisa and Hon Mr B. A. Mnguni
Co-Chairpersons of the Constitutional Review Committee

COPY : Secretary to Parliament

DATE : 4 August 2011

SUBJECT : REQUEST TO REVIEW SECTION 35(3)(n) OF THE CONSTITUTION

LEGAL ADVISER : P. Ngema

COMMITTEE REF : CR 4 / 11

REFERENCE : 138 / 2011



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1. Our Office was requested to advise the Constitutional Review Committee on the submission from Mr T.A. Mojaki for the review of section 35(3)(n) of the Constitution.
2. Mr Mojaki is an inmate incarcerated at Mangaung Correctional Centre. The submission does not disclose the crime that Mr Mojaki was convicted and incarcerated for. Mr Mojaki has been in detention since April 2004. He was sentenced to 15 years imprisonment in September 2006.
3. Mr Mojaki alleges that the Correctional Services Parole Board has been releasing, on parole the inmates that were already sentenced prior to 1 October 2004. He also mentions that 'there was an application that went before the High Court of South Africa: Witwatersrand Local Division which dealt with the guidelines set by the Department of Correctional Supervision. He submits that Justice Satchwell found that the parole provisions of Act 8 of 1959 applied to prisoners that were sentenced prior to 01 October 2004 and that the provisions of that Act should continue to apply until all such prisoners are considered for parole after serving one third of their sentence.'

4. A case we found with similar facts as those mentioned in the submission is the case of *Combrinck and Another v Minister of Correctional Services and Another (D) 2001 SA 338*. The facts of this case concerned two applicants who were prisoners serving long terms of imprisonment and had been sentenced prior to April 1998. There have been many changes to the parole processes even by the time of this judgment. The Durban High Court in this case at page 343 A, through Judge Levinsohn said:

Prisoners incarcerated prior to 1998 had at the very least a legitimate expectation that upon happening of defined events such as having served half their sentence, their case for placement on parole would be considered and would be done in accordance with existing criteria and guidelines set out in the Act. The document alters all this and does so retrospectively. In addition the document seeks to prescribe to parole boards certain rigid criteria and to that extent it may be said it fetters such board's discretion. To my mind this is unfair and the applicants have succeeded in establishing that they are entitled to relief.

5. The Correctional Services Act, 1998 (Act No. 111 of 1998) ("the 1998 Act") which came into operation on 1 October 2004, succeeded the Correctional Services Act, 1959 (Act No. 8 of 1959) ("the 1959 Act"). In terms of the presumption against retrospective application of the law all offenders that were sentenced prior to 1 October 2004 are eligible for consideration for placement on parole in terms of "the 1959 Act" and not the "1998 Act".
6. In *Jacobus van Gund v Minister of Correctional Services and others case number 10334/10* (reportable) the North Gauteng High Court, (Pretoria), the applicant was a sentenced prisoner who was sentenced prior the commencement of the Correctional Services Act, 1998 (Act No.111 of 1998). In paragraph 10 of this judgment the court observed this:

At the time the applicant was sentenced the policy applicable to him was that he should serve at least 1/3 of his sentence before he can be considered for placement on parole.

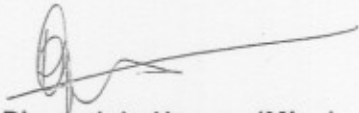
7. Before any amendments were effected to "the 1959 Act" prisoners were required to have served 1/3 of the whole imprisonment sentence before being eligible for consideration of placement on parole. Mr Mojaki makes a contrast and comparison of the provisions for "the 1959 Act" on parole and those of "the 1998 Act". "The 1998 Act" provides that an inmate serving a determinate sentence should serve half (1/2) of the sentence of imprisonment before being considered for placement on parole.

8. Mr Mojaki therefore argues that since he has been in detention since April 2004 he is eligible for consideration of placement on parole in terms of "the 1959 Act" and not the provisions of "the 1998 Act" in line with section 35(3)(n) of the Constitution. Section 35(3)(n) of the Constitution provides as follows:

Every accused person has a right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments if the prescribed punishments for the offence has been changed between the time that the offence was committed and the time of sentencing.

9. Section 35(3)(n) protects the accused persons and provides the benefit of certainty, fairness and justice when such a person is being tried whilst changes in law are introduced during the proceedings of that process. In terms of section 35(3)(n) of the Constitution the accused person will benefit from the least severe of the prescribed punishments for the offence from the time the offence is committed to the time of sentencing. Hence the argument of Mr Mojaki that he committed the offence and has been in detention since April 2004 and therefore should benefit from section 35(3)(n) right and be considered for placement on parole once he has served a 1/3 of the imprisonment sentence.
10. He further argues that the changes in law and application of that law by the Parole Boards as they are only releasing inmates that were sentenced prior to 1 October 2004 and not those sentenced after this date like him or already detained prior to this date as section 35(3)(n) provides, that violates his constitutional right in this very section and is the reason he is requesting the review of the very same section.
11. The concern with his first argument, which is not substantial, is that it will be an anomaly to demand the review of the Constitution to align it with the provisions of these two Acts and the on-going administrative action by the Parole Boards and, we believe, that is not what Mr Mojaki intended. Instead he intends to invoke the protection afforded by and exercise his right in section 35(3)(n) of the Constitution. Mr Mojaki does not attack section 35(3)(n) of the Constitution but rather seeks to invoke the protection afforded by the relevant section. Therefore the review of the relevant section is unnecessary.
12. We are of the view that Mr Mojaki may submit his application to the Parole Board for its consideration of the matter.
13. We recommend that the Committee consider providing Mr Mojaki with an updated copy of the Constitution and advise him to file his application for release on parole with the Correctional Supervision and Parole Board.

14. The Committee may also refer the submission to the parliamentary committees that oversee the Department of Correctional Services for their consideration of Mr Mojaki's submission



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Parliamentary Legal Adviser

placement on parole after serving one-third (1/3) of their sentence, irrelevant of time and sentenced period.

the Constitution of the Republic of South Africa, Act 108 of 1996 provides as follows in Section 35(3)(m) - "Every arrested person has a right to a fair trial, which include the right to benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

As I am mentioning this, I committed my offence in April 2007 and was sentenced to 15 years imprisonment in September 2007, by the time the order for considering prisoners on placement for parole being implemented, I was already detained.

which means I am rightfully eligible for parole after serving 1/3 of a determined sentence imposed on me instead of serving half (1/2) sentence prescription of the Correctional Services Act III of 1998.

Now, the Correctional Services Parole Board release inmates on parole, only those who was sentenced prior to October 2007, while Section 35(3)(m) of the Constitution state that even offenders who committed the offence prior the order was handed before the motion week of 13-17 September 2007, has the right to benefit of the least severe of the prescribed punishment if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.

I now humbly request your office to review section 35(3)(m) of the Constitution and see if it that the Correctional Services does abide to the Constitution law. And I will be pleased if you could provide me with feedback of this request on an updated copy of the Constitution.

Your assistance regarding this matter will be highly appreciated.
With Kind regards,
I A MOKWE 6/30/11